Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-299

NATIONAL GYPSUM COMPANY,
Appellant,

v.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.
Appellees.

Appeal from the Supreme Court of Louisiana

Motion to Dismiss on behalf of the Administrator of the Department of Employment Security of the State of Louisiana, Oil Chemical & Atomic Workers Local Union No. 4-447, and Louisiana AFL-CIO, Appellees,

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Appellees.

Appeal from the Supreme Court of Louisiana

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Louisiana on the grounds that this Honorable Court lacks jurisdiction to entertain the appeal for reasons that a substantial Federal question was not timely raised in the state court; and, for the further reason that the proceedings in the state court does not present a substantial federal question.

Appellant's description of the proceedings below is misleading insofar as it seeks to convey the impression that the question presented was raised at any time prior to Appellant's Petition for Rehearing in the Supreme Court of Louisiana, *see infra*.

I. THE FEDERAL QUESTION WAS UNTIMELY RAISED IN THE STATE COURTS.

Appellant states that the federal question presented by its appeal was raised on petition for rehearing in

the Supreme Court of Louisiana. (JS 5-6; see also JS 2, last sentence.) This was too late. As the leading commentators on practice in this Court have put it:

> Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *Hanson* v. *Denckla*, 357 U.S. 235, 243-4; *Herndon* v. *Georgia*, 295 U.S. 441, 443; *American Surety Co.* v. *Baldwin*, 287 U.S. 156; *Forbes* v. *State Council*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U.S. 326, 333-4; *Forbes* v. *State Council, supra*, 399; *McCorquodale* v. *Texas*, 211 U.S. 432, 436-7. There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW* v. *Johnson, supra*, 128 [1].

In this case the ruling of the Supreme Court of

[1] R. Stern and E. Gressman, *Supreme Court Practice*, fourth ed., 1969, p. 124. The quoted passage also makes clear the futility of appellant's speculation that the denying of the petition for rehearing by the Louisiana Supreme Court "implicitly upheld the validity of the state law." (JS 3).

Louisiana on the petition for rehearing, in its entirety, was "Rehearings Refused".

There is, to be sure, a single narrow exception to the foregoing rule:

> Thus if the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only change to present the matter to that court. Accordingly the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing is summarily denied without reference to the federal question . . . the litigant must be able to show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon* v. *Georgia*, 295 U.S. 441.

Appellant does not expressly assert that this case comes within this exception, for it does not acknowledge the existence of a jurisdictional problem. However, the following passage appears to insinuate that the Herndon exception applies:

> Following this decision [of the Louisiana Supreme Court], which for the first time authoritatively construed La. R.S. 23:160 (4), the Employer applied for rehearing on the ground, inter alia, that the state law, as interpreted by the state supreme court, was preempted by federal labor policy. (JS 6)

It is of course not enough to excuse the failure to raise the federal question prior to a petition for re-

hearing that the highest court of the state has decided a case of first impression under state law in a manner adverse to the appellant. It is required that "the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." (*Herndon supra*, 295 U.S. at 444.) Here the possibility that the state supreme court would construe the state unemployment compensation statute to allow benefits to locked out employees, could and should have been anticipated since that is the construction which the Department of Employment Security had placed on it, and had defended in the state courts. Nor was there any reason why appellant, in challenging the Department's eligibility ruling, could not at an earlier stage as it eventually did on petition for rehearing have asserted as a separate ground that if the state statute were so construed it would conflict with federal law.

Of course, counsel's disappointment in the disposition of state law issues, or even a reasonable belief that those issues would be decided a certain way, does not mean that the opposite result could not have been "anticipated" in the sense of cases such as *Herndon*, supra. What is required is a completely unexpected reversal of the posture of the litigation, as in the celebrated case of *Brinkeroff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, where the ruling which created the federal question "was not suggested by anyone in the entire litigation until the supreme court filed its opinion".

Additionally, appellant apparently seeks to convey the impression that it asserted its federal claim prior to the petition for rehearing in the Supreme Court:

> The validity of the Employer's lockout under federal labor law and the *American Ship Building Co.* v. *NLRB* 380 U.S. 300 decision was argued in the brief and in oral argument to the Civil District Court for the Parish of Orleans, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court. The dissenting opinion of the Louisiana Supreme Court agreed with the Employer's argument. (Jurisdictional Statement 6) [2]

The foregoing is obviously insufficient to comply with the requirements of this Court's rule 15 (1) (d) that the statement of the case shall contain

> such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter [which raised the questions] appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction this court.

Moreover, the record affirmatively shows that, as late as its brief on the merits in the state supreme court, appellant, in the course of the argument in which it invoked "federal labor law and the American Ship

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[2] See also Jurisdictional Statement 2: "The Employer argued in the state court that its lockout was protected by federal labor law."

Building decision" said regarding the power of the states to grant unemployment benefits to locked out employees: (Jurisdictional Statement 6)

> While *a state is free to choose to pay unemployment compensation to locked-out employees, or even to strikers, by appropriate legislation*, once the state chooses to make participants in a "labor dispute" ineligible for benefits, the state may not then adopt a definition of a labor dispute that conflicts with federal labor policy.[3]

As appears from the foregoing sentence, and the entire passage which is reprinted as an appendix hereto (pp. 23-27 infra), appellant's reliance on federal law was solely for the proposition that if eligibility is made to turn on the existence of a labor dispute, the state may not distinguish between strikers and employees who have been locked out. Thus, far from giving the Supreme Court of Louisiana the opportunity to decide the federal question which the company now presents on its appeal, the company's brief to that court denied the existence of that question.[4]

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[3] Original Brief on Behalf of National Gypsum Company, Plaintiff-Appellee, on the Merits, p. 7, emphasis added.

[4] Appellant's reliance on one of the dissenting opinions in the Supreme Court of Louisiana (JS 6) is misplaced for two reasons.

First, even if the dissenting opinion clearly established that one or more members of the minority in the state supreme court would have decided the federal question in appellant's favor, this would not suffice; for jurisdictional purposes it is necessary that the question be timely presented to or decided by the majority. Compare *Charleston* Federal Savings & L. Ass'n. v. Alderson, 324 U.S. 182, 186, n. 1 and cases there cited holding that even a certificate of the presiding justice of the highest court does not suffice to establish that the federal question was properly raised in that court.

Second, appellant's quotation of the dissenting opinion (JS 61a quoted at JS 9, which in turn is referred to at JS 6, note 4) is misleading. When the citations which appellant omits are restored, one finds that "the law" which in the dissenting judge's view "shelters" the lockout (JS 61a) is not *federal* law but "LSA-R.S. 23:1531-1571." (Id.) This reading is further confirmed by the remainder of the dissenters' opinion: "As the Court of Appeal noted, we are confronted here with an important *state policy*, that of maintaining state neutrality in labor disputes. By its decision, the majority has done violence to that policy. See *Johns-Manville Corp.* v. *Doyal*, ____F.2d ____(5th Cir. 1975)." (Id. emphasis added.)

[5] We note, however, that appellant exaggerates when it says "the state replaces the missing wages," for the benefits are substantially less than is earned in a normal work-week.

It is clear from the foregoing that appellant did not raise the federal question in a timely manner in the state courts, and this Court therefore lacks jurisdiction over this appeal.

II. THE FEDERAL QUESTION IS INSUBSTANTIAL.

A. Introduction—The Touchstone is Congress Purpose.

In appellant's view, the issue involves a simple syllogism; 1) the lockout is an economic weapon which federal law contemplates an employer may utilize in order to achieve its goals in collective bargaining; 2) the payment of unemployment compensation benefits by States substantially reduces the effectiveness of the lockout; *ergo*, this is a form of interference with federal policy forbidden by the Supremacy Clause. We readily accept the first of appellant's premises, and for present purposes the second as well.[5]

Our disagreement is with the conclusion which appellant would draw from these premises.

For while the precedents which appellant cites establish that state policies must often yield to the federal policy favoring the free play of economic forces, this court has also cautioned that these cases do not establish an absolute rule forbidding any form of state activity which will adversely affect the exercise of federally sanctioned economic weapons. As the Court explained in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103:

> "San Diego Building Trades Council vs. Garmon [359 U.S. 236] however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations.
>
> "The purpose of Congress is the ultimate touchstone. Congress under the Commerce Clause may displace state power (Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234-236; San Diego Bldg., Trades Council v. Garmon, supra) or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime. See Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141-143. (375 U.S. at 103-104).

The fundamental flaw in appellant's argument is that it ignores the most direct evidence of "the purpose of Congress" with respect to the scope of state authority on the precise matter at issue here. That evidence is threefold: 1) in the Social Security Act of 1935 Congress as a matter of deliberate choice pre-

served for the states broad freedom to determine elegibility for unemployment compensation benefits, and did so with the knowledge that the states might choose to grant elegibility to employees involved in labor disputes; 2) in the same year Congress adopted the Social Security Act, and under the sponsorship of the same senator, Mr. Wagner, Congress also enacted the original National Labor Relations Act; and 3) when Congress amended the National Labor Relations Act in 1947 it deliberately rejected a proposal which was designed to render strikers ineligible for unemployment compensation benefits.

B. The Basic Unemployment Compensation Law Authorizes the States to make their own Determinations as to whether Strikers Shall be granted Benefits

From the very beginning of the federal unemployment compensation program the States have been free to determine whether and under what conditions strikers are to be eligible for benefits. Under the scheme of Titles III and IX of the Social Security Act of 1935,[6] States obtained federal funds for the administration of unemployment compensation programs if they adopted unemployment compensation laws which were approved by the Social Security Board.

Section 903 of the Act required the Social Security Board to approve any State law which satisfied

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[6] 49 Stat. 620; these are presently codified as 26 USC §3301 *et. seq.*, 42 USC §501 *et. seq.*, and 42 USC §1101 *et. seq.*

certain conditions; the only conditions dealing with eligibility for benefits were set forth in §903(a)(5).[7] In all other respects the States were to be free to create their own eligibility standards.

The broad leeway thus given the States was a matter of conscious choice by Congress. As was stated in the Report of the Senate Finance Committee:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." Senate Report No. 628, 74th Cong., 1st Session, pp.

Thus in sustaining the constitutionality of the program against the charge that it "call[s] for a surrender by the states of powers essential to their quasi-sovereign existence" by §903, Mr. Justice Cardozo relied on its limited scope and observed: "A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." *Steward Machine Co. v. Davis*, 301 U.S. 548, 593.

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[7] "(5.) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;"

Titles III and IX of the Social Security Act of 1935 have been amended many times. But the provisions with which we are here concerned have remained unchanged. The philosophy embodied in the 1935 Social Security Act still holds sway. As Congressman Mills, the Chairman of the House Ways and Means Committee and the floor manager of the Employment Security Amendments of 1969 stated:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States.
>
> For example, there are two States, I recall,

Congress knew that the States could exercise the authority reserved by §903 to declare strikers eligible for unemployment compensation benefits. First, New York, one of only five States which had enacted an unemployment compensation law before the federal law was passed, had declared strikers eligible after ten weeks. Congress was fully aware of the New York law. (See e.g., Report of the Senate Finance Committee, *supra*, p. 11). Second, the Committee on Economic Security had considered the problem of the interrelation of unemployment compensation and a system of free collective bargaining with the following twofold result. In the draft bill prepared for the use of State legislatures contemplating entry into the unemployment compensation program, the Committee *suggested* that the States disqualify from eligibility persons whose unemployment is due to a labor dispute. The first of these draft bills was before Congress. (See E. Witte, The Development of the Social Security Act, p. 125 (U. Wis. Press, 1963.) Congress decided to *forbid* States from disqualifying workers who refused to take employment at the scene of a labor dispute embodied in §903(a)(5)(A), thus further showing that it had focused on the labor dispute problem and chose to create a national standard only on one aspect thereof.

which will pay unemployment benefits when employees are on strike, but only two out of 50 make that decision. That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it, and the gentleman would not vote for it, but if the State wants to do it we believe they ought to be given latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (Nov. 13, 1969)

C. It is not inconsistent with The National Labor Policy for a state to provide Unemployment Compensation benefits to striking or locked employees.

1. The Original National Labor Relations Act

The principle that contract terms are to be determined through a system of collective bargaining in which the use of economic weapons by employees through their unions and by employers is sanctioned as an affirmative policy in the National Labor Relations Act in 1935, see, e.g., Porter Co. v. NLRB, 397 U.S. 99, 103-105.

There is nothing in the NLRA which deals expressly with the question of whether that principle forecloses striker eligibility for unemployment compensation benefits. Nevertheless it is clear that Congress did not by adopting the National Labor Relations Act intend to reverse its decision in the Social Security Act to allow self-determination by the states on this subject. For if ever two statutes are to be read as *in pari materia*, it is the Social Security Act of 1935 and

the National Labor Relations Act of 1935. Not only were these statutes passed in the same year as major elements of the New Deal program, Senator Wagner, the prime mover of the National Relations Act, was also a sponsor of the Social Security Act, see 79 *Cong. Rec.* 9283. The bills moved through Congress at the same time, with the National Labor Relations Act being enacted on July 5, 1935, and the Social Security Act becoming law on August 14, 1935.[8]

2. The 1947 Amendments to the National Labor Relations Act

So matters stood when in 1947 the 80th Congress addressed itself to revising the Wagner Act. The wisdom of permitting strikers to draw unemployment compensation was then, as it is now, a controversial issue.

The House of Representatives determined to put an end to the practice by declaring that strikers who

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[8] Wagner Act:
Senate Debate May 14-16, 1935
House Debate June 19, 1935
Conference Report agreed to by House and Senate June 27, 1935
Presidential Signature July 5, 1935
Social Security Act:
House Debate April 11-19, 1935
Senate Debate June 14, 15, 17-19, 1935
Conference Report agreed to by the House August 8, 1935
Conference Report agreed to by the Senate August 9, 1935
Presidential Signature August 14, 1935

accepted unemployment compensation benefits would thereby forfeit their status as employees and lose the statutory right to reinstatement which flows therefrom. (Cf. *Labor Board* v. *Mackay Radio Corp.*, 304 U.S. 333.) This was to be accomplished by amending the statutory definition of employee to exclude any person "receiving unemployment compensation from any state." [9] The House Committee on Education and Labor explained the purpose of this provision:

> A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social-security laws, which Congress intended to provide for unemployment compensation for those out of work involuntarily and through no fault of their own. We therefore have provided that a striker's status as an 'employee' stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status.[10]

The Senate, however, did not adopt this proposal, opting instead to "follow the provision of the existing law with three exceptions", none of which touched the right of strikers.[11] The Senate's view prevailed on

[9] H.R. 3020, 80th Cong., as reported out, p. 4, and as it passed the House, p. 4, reprinted in I Legislative History of the Labor Management Relations Act of 1947 (hereafter "1947 Leg. Hist."), pp. 34, 161.

[10] H. Rep. No. 245, 80th Cong., 1st Sess., pp. 12-13, 1947 Leg. Hist., 303-304.

[11] H. Conf. Rep. No. 510, 80th Cong., 2d Sess., p. 33, 1947 Leg. Hist., p. 537.

this issue, although the House version of the definition of "employee" was adopted in other respects.

Since Congress thus focused on the specific question whether the receipt by strikers of unemployment compensation is inconsistent with the national labor policy, this legislative history is a decisive demonstration of Congressional intent and understanding which refutes the appellant's purely theoretical arguments from the national labor policy.

In sum, in dealing with the extent to which unemployment compensation benefits would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress has chosen "to abandon any search for uniformity ***and decided to suffer a medley of attitudes and philosophies on the subject," (*Schermerhorn*, *supra*, 375 U.S. at 104-105). Thus, a state decision to utilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in §903 are observed), no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn*, *id.* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action.

CONCLUSION

For the above stated reasons, this appeal should be dismissed.

Wherefore, Appellees respectfully submit that the

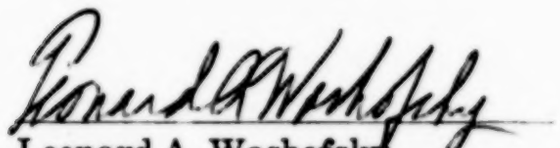
questions upon which this cause depends are to unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss the Appeal, or, in the alternative, to affirm the decision of the Louisiana Supreme Court.

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APPENDIX

Excerpts from Appellants brief to Louisiana Supreme Court.

The Public Policy Governing Cases Arising Under La. R.S. 23:1601(4).

An important public policy of providing relief from economic duress to the unemployed is the basis of many provisions of the Unemployment Compensation Act. However, the Court of Appeals recognized that an equally important public policy of State neutrality in labor disputes underlies subsection 1601(4). *National Gypsum Company v. Administrator, supra* at 534.

Indicative of this policy are cases holding that a claimant unemployed due to a labor dispute must affirmatively prove his eligibility for benefits. The burden is on the claimant to prove lack of participation or interest in that labor dispute. *Senegal v. Lake Charles Stevedores, supra*; *Hanndyman Homes, Inc. v. Administrator,* 192 So. 2d 827 (1st Cir. 1966); *Brown v. Brown, supra.* The legislature created a clear distinction between subsection 1601(4) and the other disqualifying provisions. For all other subsections the *company* must prove the claimant ineligible; only in subsection 1601(4) must the *claimant* bear this burden. Furthermore, the Louisiana Supreme Court has held that the legislature intended subsection 1601(4) to be a broad disqualification. *Senegal v. Lake Charles Stevedores, supra* at 651. The Court of Appeals correctly ruled that section 1601(4) should be applied in

accordance with this public policy of state neutrality in labor disputes. *National Gypsum Company v. Administrator, supra* at 534.

Claimants' Unemployment Is Due To An Active Labor Dispute

Louisiana law on unemployment compensation provides, in pertinent part:

> "An individual shall be disqualified for benefits:
> . . . (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which causes his unemployment. . . .

La. R.S. 23:1601(4).

The initial question under section 1601(4) is whether the unemployment of the claimants was "due to a labor dispute." The Company submits that a lockout occurring during collective bargaining and brought to protect the Employer's bargaining position constitutes a labor dispute within the meaning of the statute. The immediately preceding subsection of this statute provides that to be eligible for compensation a claimant need not accept a position vacant due to a "strike, lockout, or *other* labor dispute." La. R.S. 23:1601(3)(b) (emphasis added). Clearly, this statutory language contemplates that the term "labor dispute" includes lockouts as well as strikes.

Although not specifically made applicable to unemployment compensation cases, Chapter 8 of Title 23 (Labor and Workmen's Compensation) of the Louisiana Revised Statutes provides this definition of labor dispute:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment or concerning employment relations, or any other controversy arising out of the respective interest of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

La. R.S. 23:821(3). The Court of Appeals correctly found that this definition was persuasive evidence that the statutory term "labor dispute" in section 1601(4) included a lockout called after the breakdown of collective bargaining negotiations. *National Gypsum Company v. Administrater, supra* at 534.

Federal labor law recognizes that the lockout used by an employer is an economic weapon equivalent to the strike called by a union. *See American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 85 Sup. Ct. 955, 13 L. Ed. 2d 855 (1965). Each evolves out of the same circumstances, the failure of the parties during collective bargaining to reach an agreement, and each represent an attempt by one party to bring economic pressure to bear on the other to support its bargaining position. Just as the employer may agree to union de-

mands or face a strike, the union may agree to the employer's position or face a lockout. In both the strike and the lockout, wages and terms and conditions of employment are inextricably tied to the resolution of the competing positions of employer and union.

State law also recognizes the equivalency of the strike and the lockout. In *Adkins v. Indiana Employment Security Division*, 70 N.E. 2d 131 (Ind. App. Ct. 1946), the court, in holding that locked-out employees were not eligible for benefits, stated:

> Viewed in its social and economic aspects, the lockout is a weapon in the hands of the employers which is a counterpart to the weapon of strike held by the workers.

Id. at 34, *citing*, *In re North River Logging Co.*, 15 Wash. 2d 204, 130 P. 2d 64, 65 (1942).

Clearly, a definition of labor dispute including strikes must include its counterpart the lockout. Moreover, the federal preemption doctrine, which requires state deferral to federal labor policies, mandates this interpretation. *See Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 8 L. Ed. 2d 418, 82 S. Ct. 1237 (1962); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 70 S. Ct. 773 (1959). [While *a state is free to choose to pay unemployment compensation to locked-out employees, or even to strikers, by appropriate legislation*, once the state chooses to make participants in a "labor dispute" ineligible for benefits, the state may not then adopt a definition of a labor dispute that conflicts with federal labor policy.] The facts of these

cases clearly constitute a labor dispute under federal law.[12] Since federal labor law recognizes the legitimacy of the Company's lockout [13] the lockout by the Company must be considered a labor dispute.

The Appellants have raised obscure arguments that it was "really" the lockout that caused the claimants' unemployment, not a labor dispute, any labor dispute was "passive" rather than "active", and the lockout was "isolated" from the dispute over a new contract. They raise the spectre of indiscriminate unemployment resulting from employers denying work under the pretex of a lockout. See Brief for Amicus Curiae p. 8. Certainly, when a lockout was not the result of a bona fide dispute, the result might be different. *But that is not the issue here.*

The Appellants raise hypotheticals while ignoring the facts of *this* case.[The Company respectfully submits that the only question before this court is whether *under the facts of this case* the claimants are participating or interested in an active labor dispute that

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[12] National Labor Relations Act, Sec. 2(9), 29 U.S.C. §152 (9) (1970) provides:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

[13] A lockout called after a bargaining impasse to support the employer's bargaining position is permitted by federal law. *American Ship Building Co., supra.*

caused their unemployment.] On the facts of this case, there is only one possible answer.

The contract between the Company and the Union expired on February 1, 1973. For more than a month prior to the expiration date the parties attempted to negotiate a new contract. At a union meeting the union members voted to authorize their bargaining committee to call a strike. A federal mediator was called in to aid in the negotiations. "Final offers" were made, and rejected, by both sides during the meeting of January 31. Further meetings were held at the request of the federal mediator on February 3 and 4, but no agreement was reached. At the meeting on February 3 the Company told the Union that if an agreement was not reached by February 5, the union members would be locked out. Following the meeting of February 4, the talks were broken off with no more bargaining sessions scheduled.

The Company locked out the claimants solely because of the failure to reach an agreement with their union. But for the labor dispute over the terms of a new contract, there would have been no lockout. Tr. 14. Clearly, the cause of the claimants' unemployment was the bona fide labor dispute existing between their union and the Company. This labor dispute was no sham; the lockout was no pretext. The labor dispute was real, and the claimants' unemployment was a direct result. The Court of Appeals stated:

> "These facts convince us that there was a controversy concerning terms and conditions of employment between the union and the employer

> and that it was in active progress at the place of employment. The failure of the parties to settle their dispute and sign a new contract (without regard to who is right or wrong) is the cause of the company locking its doors and preventing the workers from continuing to work. We conclude that this meets the test of disqualification required by the statute."

300 So. 2d at 534.

Claimants Are Interested In Or Participating In The Labor Dispute That Caused Their Unemployment

Since the claimants' unemployment is due to the lockout labor dispute, the burden is on them to prove that they were neither participating in nor interested in that labor dispute.